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SUPERVENING IMPOSSIBILITY OF PERFORMING CONDITIONS IN INSURANCE POLICIES*

The policy of insurance is normally a unilateral contract;[1] only the insurer is an obligor, and his obligation is hedged about with numerous conditions for his protection.[2] Since the question is restricted to cases of supervening impossibility,[3] or impossibility arising after the formation of the contract, affirmative warranties and all other conditions which are complied with, if at all, at the inception of the contract, are excluded from consideration, and the discussion is limited to cases of impossibility of performing promissory or continuing warranties and other conditions of the policy to be complied with after the formation of the contract.

The "legal consequences as to the obligor" will include not only the liability of the insurer to pay the principal sum insured, but also his liability to return the premium. Furthermore, since judicial relief against the hardships resulting from impossibility of performance is frequently given under the guise of construing the terms of the contract,[4] the discussion will not be strictly confined to cases in which impossibility has been recognized or repudiated as a legal excuse for a recognized breach of condition, but will take account in a limited measure of the process of judicial construction in cases where impossibility of literal compliance has arisen.

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*This article is an attempt to answer, so far as the law of insurance is concerned, the following general question of contract law: What are the legal consequences as to the obligor of non-performance by the obligee of a condition of the obligation because of impossibility which arises after the formation of the contract? The article is one of a series the first of which by Professor Arthur L. Corbin appeared in the May 1922 COLUMBIA LAW REVIEW. Articles by Professors Austin Tappan Wright and Karl N. Llewellyn will be published in succeeding numbers.—Editors' Note.

[1] Williston, *Contracts* (1920) § 673.

[2] Even where the conditions are framed in the language of a promise by the insured, it is doubtful if any court would construe them to be promises. *Ibid.* Thus, under typical life insurance policies it has been held that the insured is under no obligation to pay the second or later premiums. *Worthington* v. *Charter Oak Life Ins. Co.* (1874) 41 Conn. 372, 401; *Roehner* v. *Knickerbocker Life Ins. Co.* (1875) 63 N. Y. 160.

[3] See Williston, *op. cit.*, § 1933.

[4] *Ibid.*, § 806.

For the present discussion, conditions in insurance policies may be divided into three classes: (I) Those which have to do with the payment of premiums; (II) those which relate to the perils or risks insured against; (III) those which relate to the proof of the validity and amount of the insured's claim against the insurer after the peril insured against has occurred. The possibility of a single condition falling in two or more of these classes will be dealt with later. These three classes embrace by far the greater number, though not all,[5] of the conditions in insurance policies.

I

CONDITIONS AS TO PAYMENT OF PREMIUMS.

It is chiefly in life insurance that the payment of premiums is a condition, as distinguished from the consideration, of the insurer's promise. The payment of the second and succeeding premiums is usually made an express condition precedent of the insurer's promise. Nevertheless, such payments, while not technically a part of the consideration of the contract, are in effect the equivalents of, or things given in exchange for, the insurer's conditional promises, or at least for a part of the things promised. Hence where the premium has not been paid at all, it would seem clear that a court cannot hold the insurer to the performance of his promise without inflicting on the insurer a hardship greater than that endured by the insured. Such a holding would virtually make the insurer give something for nothing. No case has gone contrary to this view,[6] though the cases holding that prompt payment of the premium was excused by the Civil War and that the beneficiary might recover upon the contract the full amount insured less the unpaid premiums with

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[5] *E. g.*, a life policy provided for paid-up insurance in a reduced amount upon lapse of the policy, with an option to the insured to take extended insurance for the full amount, covering a limited period, provided the policy was surrendered within thirty days from the date of default in paying the premium. *Held*, that the insanity of the insured did not excuse performance of the condition as to surrender of the policy, within the time specified. *Tyson* v. *Equitable Life Ass. Soc.* (1916) 144 Ga. 729, 87 S. E. 1055. In *Grossmayer* v. *District No.* 1, *Benai Berith* (1902) 70 App. Div. 90, 74 N. Y. Supp. 1057, *aff'd* without opinion (1903) 174 N. Y. 550, 67 N. E. 1083, a by-law of a fraternal society purported to annul the original designation of plaintiff, the insured's mother, as beneficiary, and made it a condition of the policy that the insured should designate a beneficiary in a book provided for that purpose. The insured was incurably insane when the by-law took effect. It was held that plaintiff might recover; the court said that impossibility of personal performance, where personal performance was required, excused compliance with the condition. See (1902) 15 Harvard Law Rev. 749. But it seems the decision may be supported on the ground that the by-law was unreasonable.

[6] See, for example, *Thompson* v. *Insurance Co.* (1881) 104 U. S. 252, where by reason of illness the insured was prevented from paying the premium and it was not alleged that it was ever paid; also, Lumpkin, *J.*, in *Hipp* v. *Fidelity Mut. Life Ins. Co.* (1907) 128 Ga. 491, 498, 57 S. E. 892 (sickness no excuse for nonpayment of premium).

interest,[7] might seem to recognize an exception; yet even here the courts treat the deduction of the accrued premiums with interest as a deferred payment.

The chief controversy has been, not as to excuses for the fact of non-payment, but as to excuses for *delay* in payment. At first blush it might seem that if the premium is paid after the due date, with interest at least equal to that which the company would have obtained by investing the same amount of money according to its usual practices, the company is made whole, has received the expected equivalent for its promise, and the hardship of the insured may be relieved without doing any substantial injustice to the insurer.[8] Such an argument overlooks the phenomenon known as adverse selection. Where the insured is under no obligation to pay the premium, but has an option to pay it or not, as he chooses, he will be much more likely to pay it if he is in poor health than if he continues to be in good health. A policy holder whose health becomes so poor that he cannot get other insurance will prefer to pay up the back premiums rather than have no insurance at all. The policy holder who continues in good health will not pay the delinquent premiums because he can get a second policy at a premium which, though based on a higher rate because of his greater age, is still less than the aggregate amount of delinquent premiums under his first policy. Thus the good risks will tend to drop out, while the poor risks will hold onto their insurance. This process of adverse selection goes on all the time in life insurance, and where the time for payment is unalterably fixed, the insurer's actuaries can reckon with it and calculate the premiums accordingly. But if the insured were allowed an *indefinite* period in which to pay his premiums, the effect of adverse selection could not be estimated and the business would be thrown into confusion.[9]

Obviously, then, the court will not be doing substantial justice to the insurer if it declares delay in payment excused by impossibility, and holds the insurer fully bound by a delayed payment of the stipulated premium with interest.[10] Aside from a few *dicta* (due to the tendency, fairly com-

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[7] *New York Life Ins. Co.* v. *Clopton* (Ky. 1870) 7 Bush 179; *Mutual Benefit Life Ins. Co.* v. *Hillyard* (1874) 37 N. J. L. 444; *Hamilton* v. *Mutual Life Ins. Co. of New York* (D. C. 1871) 9 Blatchf. 234, 11 Fed. Cas. 351.

[8] This naive argument is made by Allen, *J.*, in *Cohen* v. *New York Mut. Life Ins. Co.* (1872) 50 N. Y. 610, 623. He says: "The interest will compensate for the non-payment at the time."

[9] The effect of adverse selection is clearly stated by Bradley, *J.*, in *New York Life Ins. Co.* v. *Statham* (1876) 93 U. S. 24, 30-31; by Carpenter, *J.*, in *Worthington* v. *Charter Oak Life Ins. Co.*, *supra*, footnote 2.

[10] In view of the argument of Allen, *J.*, *supra*, footnote 8, it might be asked if the court could not do even-handed justice by requiring the insured to pay not only the premium with interest but also an additional compensation to cover the prejudice to the company by adverse selection. The answer is, there is no method of computing what the added burden is for a particular case. Standard mortality tables are based on variations in age; they take no account of variations in health. In most of the cases that have arisen, the insured was dead when the action was brought, and it would be absurd to apply the average expectancy of life to such a

mon in judicial opinions, to confuse impossibility as an excuse for breach of promise with the same as an excuse for breach of condition,[11] or to treat conditions as to premium-paying as conditions subsequent in the sense in which conditions of re-entry in leases are conditions subsequent) [12] only one line of decisions throws any doubt upon the principle that impossibility of payment will not excuse delay in payment beyond the day named so as to make the insurer's promise enforceable. These are the cases which have held that a resident of the Confederate States during the Civil War was excused by illegality from payment *ad diem* to an insurer domiciled in the North, and that the insurer's promise would be enforced.[13] Several of these cases emphasize other grounds than impossibility, as that payment was prevented by the insurer,[14] or that the war automatically suspended the entire contract,[15] or other grounds;[16] only a few cases are left. On the other hand, it has been flatly held that the insurer's promise is not enforceable under such circumstances.[17]

All this is upon the assumption that the insured is under no obligation to pay the premium. Where he is under an obligation to pay whether he wants to or not, the argument based on adverse selection is largely vitiated, and far less hardship will be imposed upon the insurer

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case. Even where, as in *Cohen* v. *New York Mut. Life Ins. Co., supra,* footnote 8, the insured is still alive when the action is brought, there is no way of telling how much the company is prejudiced. It may be noted that many companies today will re-instate the delinquent policy-holder if a medical examination shows him to be a good risk; but that is quite a different matter from compelling the insurer to re-instate all who apply.

[11] Miller, *J.,* in *Wheeler* v. *Connecticut Mut. Life Ins. Co.* (1880) 82 N. Y. 543, 551; Allen, *J.,* in *Cohen* v. *New York Mutual Life Ins. Co., supra,* footnote 8, p. 622 ("That which will avoid a covenant will nullify a condition, and *vice versa*"); Bedle, *J.,* in *Mutual Benefit Life Ins. Co.* v. *Hillyard, supra,* footnote 7, p. 472.

[12] Peckham, *J., in Sands* v. *New York Life Ins. Co.* (1872) 50 N. Y. 626, 632; Bedle, *J.,* in *Mutual Benefit Life Ins. Co.* v. *Hillyard, supra,* footnote 7, p. 472, says it is neither a condition precedent nor a condition subsequent.

[13] *Cohen* v. *New York Mutual Life Ins. Co., supra,* footnote 8 (looks like a declaratory judgment, since the insured was still alive); *Sands* v. *New York Life Ins. Co., supra,* footnote 12; *New York Life Ins. Co.* v. *Clopton, supra,* footnote 7; *Statham* v. *New York Life Ins. Co.* (1871) 45 Miss. 581; *Mutual Benefit Life Ins. Co.* v. *Hillyard, supra,* footnote 7; *Manhattan Life Ins. Co.* v. *Warwick* (Va. 1871) 20 Gratt. 614; *Hamilton* v. *Mutual Life Ins. Co. of New York, supra,* footnote 7.

[14] Simrall, *J.,* in *Statham* v. *New York Life Ins. Co., supra,* footnote 13, p. 598; Anderson, *J.,* in *Manhattan Life Ins. Co.* v. *Warwick, supra,* footnote 13, pp. 622-24, 640; Blatchford, *J.,* in *Hamilton* v. *Mutual Life Ins. Co. of New York, supra,* footnote 7, pp. 251-56, 260.

[15] Peckham, *J.,* in *Sands* v. *New York Life Ins. Co., supra,* footnote 12, pp. 636-37; Simrall, *J.,* in *Statham* v. *New York Life Ins. Co., supra,* footnote 13 p. 593; Bedle, *J.,* in *Mutual Benefit Life Ins. Co.* v. *Hillyard, supra,* footnote 7, p. 469; Blatchford, *J.,* in *Hamilton* v. *Mutual Life Ins. Co., supra,* footnote 7, p. 247.

[16] Payment in Confederate money was good payment. *Sands* v. *New York Life Ins. Co., supra,* footnote 12, p. 638. Bond given and accepted in payment of premium was good payment. *New York Life Ins. Co.* v. *Clopton, supra,* footnote 7, p. 190.

[17] *New York Life Ins. Co.* v. *Statham, supra,* footnote 9 (seven judges to two on this point); *Worthington* v. *Charter Oak Life Ins. Co., supra,* footnote 2; *Dillard* v. *Manhattan Life Ins. Co.* (1871) 44 Ga. 119.

if impossibility is held to excuse delay in payment. Yet even then the insurer would be deprived of a valuable means of compelling performance of the insured's promise to pay. One case has held that fatal illness is no excuse under such circumstances.[18]

It is uniformly held that neither insanity,[19] nor illness [20] will excuse delay in payment where payment is optional with the insured. It is not clear in many cases whether or not the court regarded insanity or illness as a true case of impossibility. Some courts have distinctly said that the payment may be made by any one and that therefore the disability of the insured does not make payment impossible.[21] This conclusion is supported by the analogous rule that subjective impossibility, as illness, does not excuse performance of a *promise* to pay money.[22] However, might not illness or insanity under some circumstances make *prompt* payment impossible? If the insured is stricken with apoplexy on his way to pay the premium and just two hours before the time limit expires,[23] is it not practically impossible for him to get any one to pay the premium for him? At all events, no case has recognized such hardship as an excuse for delay in payment.

The cases dealing with impossibility of paying the premium have generally not considered any other legal consequence than the enforcement of the insurer's promise to pay the full amount of the insurance. In *New York Life Insurance Co.* v. *Statham*,[24] the United States Supreme Court by a five-to-four decision held that payment *ad adiem* was rendered impossible by the outbreak of the Civil War and that the beneficiary named in the policy could recover the "equitable value" of the policy; by this the court seems to have meant the full amount of the reserve on the policy up to the date of the default in payment. This holding was in spite of a clause in one of the policies to the effect that

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[18] In *Thompson* v. *Insurance Co.*, *supra*, footnote 6, it appeared that the insured was dangerously ill when his premium note fell due; the company was held not liable on the policy.

[19] *Wheeler* v. *Connecticut Mut. Life Ins. Co.* (1880) 82 N. Y. 543; *Klein* v. *Insurance Co.* (1881) 104 U. S. 88; *Pitts* v. *Hartford Life and Annuity Ins. Co.* (1895) 66 Conn. 376, 34 Atl. 95; *McCann* v. *Heptasophs* (1913) 119 Md. 655, 87 Atl. 383, and note (1913) 46 L. R. A. (N. S.) 537.

[20] *Want* v. *Blunt* (1810) 12 East 183; *Thompson* v. *Insurance Co.*, *supra*, footnote 6; *Hipp* v. *Fidelity Mut. Life Ins. Co.*, *supra*, footnote 6, p. 497; *Brotherhood of Railway Trainmen* v. *Dee* (1908) 101 Tex. 597, 111 S. W. 396; and see the notes in (1908) 12 L. R. A. (N. S.) 319 and (1913) 46 L. R. A. (N. S.) 537.

[21] Miller, *J.*, in *Wheeler* v. *Connecticut Mut. Life Ins. Co.*, *supra*, footnote 19, p. 550; Woods, *J.*, in *Klein* v. *Insurance Co.*, *supra*, footnote 19; Brown, *J.*, in *Brotherhood of Railway Trainmen* v. *Dee*, *supra*, footnote 20, pp. 602-3.

[22] Williston, *op. cit.*, § 1932.

[23] As in *Howell* v. *The Knickerbocker Life Ins. Co.* (1871) 44 N. Y. 276; yet Gray, *C.*, said this was not a case of impossibility (p. 281).

[24] *Supra*, footnote 9. In *Abell* v. *Penn Mutual Life Ins. Co.* (1881) 18 W. Va. 400, 430-441, it was held that the beneficiary under similar circumstances could recover the amount of premiums paid with interest, with deduction of the net or natural premium for the years during which the policy was in force, but without any deduction for the company's expenses of operation or for profits. This seems more favorable to the insured than equity requires.

upon default in payment of any premium all prior payments should be forfeited to the company. There is much to be said in support of this decision. It is a recognized principle of the life insurance business that under the level premium plan the insurer must accumulate a reserve fund out of the payments made by a group of policy-holders insured at a certain age, to meet the excessively heavy death claims of later years. The reserve on a particular policy can be accurately estimated, and hence the amount of the claim of any particular insured against the reserve fund is accurately known. If the company is allowed to retain this sum, will it not be unjustly enriched at the expense of the insured? Or, is not the situation sufficiently similar to that created by a common law mortgage to make similar equitable principles applicable? It would seem indeed, that the insured or his personal representatives, not the beneficiary (as in the principal case) would be the proper parties to recover the "equitable value." Under the pressure of statute or competition, most life companies today expressly agree to pay surrender values when the policy is terminated before maturity; but these promised payments are sometimes less than the full reserve value of the policy. Under the doctrine of the principal case, then, a policy-holder prevented by impossibility from making payment *ad diem* might be entitled to recover the full reserve value of his policy, even though the policy itself stipulated for the payment of a smaller cash surrender value.

II

CONDITIONS RELATING TO THE RISK

Conditions affecting the risk insured against, frequently called "warranties," [25] define the scope of the insurer's promise, called in insurance parlance the "coverage." To relieve against compliance with a warranty on the ground of impossibility would be to extend this coverage and to make the insurer sell something which he never bargained to sell. Moreover, it is a fundamental principle of insurance that the peril or casualty insured against must be beyond the conscious control of the insured,[26] and hence the contract is made in contemplation of risks which neither party can possibly prevent. It would seem, therefore, that, even assuming that the doctrine of impossibility as applied to breach of promises [27] were to be applied to breach of conditions, a court could rarely say that circumstances of hardship were not contemplated by the parties and hence furnished the basis for an implied

[25] "Warrenty" in insurance does not mean a promise, as it does in the law of sales.

[26] Richards, *Insurance* (3d ed. 1914) § 2.

[27] In Williston, *op. cit.*, § 1937, it is said that "the basis of the defense of impossibility [as applied to a breach of promise] is the presumed mutual assumption of the existence of some vital fact . . . in the absence of which performance would be impossible."

exception. In fire and marine insurance, the premium varies with the particular types of risk; and to compel the company to make payment for a loss where the risk incurred was greater than that paid for, would endanger the security of the whole enterprise and harm not only the company's shareholders but also its other policy-holders.

With two exceptions, the authorities are uniform to the effect that impossibility of compliance with conditions relating to the risk will not excuse a recognized breach of condition, so as to make the insurer liable upon his promise to pay the sum insured. This conclusion is inescapable where the condition unmistakably depends upon an event which the insured cannot possibly control; as where a fire policy provides that the insurer's obligation "shall be void if . . . with the knowledge of the insured, foreclosure proceedings be commenced,[28] or notice given of any sale of any property covered by this policy,[29] by virtue of any mortgage or trust deed." Such a condition relates to the moral risk.[30] So a condition in a life policy against suicide of the *cestui que vie* will be enforced against a beneficiary who could not possibly have prevented the suicide.[31] Again, where a fire policy unmistakably provides that the insurer's obligation shall be void if the risk is increased by the act of a third party which the insured could not possibly control, the condition will be enforced.[32]

The decided weight of authority supports the view that a clear breach of condition by a tenant for a fixed term[33] or a servant of the insured[34] avoids the policy; but it is not clear that these are all cases of objective impossibility. The insured might be able to prevent the event by reserving a right of entry (as to the tenant) and exercising an uncanny diligence in watching the tenant or the servant.[35]

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[28] *Norris* v. *Hartford Fire Ins. Co.* (1899) 55 S. C. 450, 33 S. E. 566 (no recovery on the policy; impossibility not discussed).

[29] In *Medley* v. *German Alliance Ins. Co.* (1904) 55 W. Va. 342, 47 S. E. 101, the insured attempted (unsuccessfully, it seems) to enjoin a foreclosure sale under a deed of trust; no recovery on the policy was allowed.

[30] Because the insured would be under a greater temptation to burn the property after foreclosure proceedings were begun. See *ibid.*, p. 367.

[31] *Mutual Life Ins. Co.* v. *Kelley* (C. C. A. 1902) 114 Fed. 268. It was further held that the insurer was under no obligation to return the premiums.

[32] *Long* v. *Beeber* (1884) 106 Pa. St. 466 (increase of risk by tenant of insured); *Shepherd* v. *Union Mut. Fire Ins. Co.* (1859) 38 N. H. 232 (increase of risk by third party on adjoining premises).

[33] *Liverpool & London Ins. Co.* v. *Gunther* (1885) 116 U. S. 113, 6 Sup. Ct. 306; *Edwards* v. *Farmers Mut. Ins. Ass'n.* (1907) 128 Ga. 353, 57 S. E. 707; and many other cases in (1908) 12 L. R. A. (N. S.) 485, note; *Westchester Fire Ins. Co.* v. *Ocean View Co.* (1907) 106 Va. 633, 56 S. E. 584.

[34] *Whealton Packing Co.* v. *Aetna Ins. Co.* (C. C. A. 1911) 185 Fed. 108, and note, 34 L. R. A. (N. S.) 563 (absence of watchman without insured's knowledge); *City of Worcester* v. *Worcester Mut. Fire Ins. Co.* (Mass. 1857) 9 Gray 27 (servant put ashes in wooden barrels for a considerable period of time).

[35] In *Liverpool & London Ins. Co.* v. *Gunther, supra,* footnote 33, p. 129, Matthews, *J.*, said: "The insured engaged that the prohibited thing should not be done, and when he committed the control of the insured premises to another the latter became his representative, for whom he must answer as for himself." In *Long* v. *Beeber, supra,* footnote 32, the court also intimates that the act of the

One New York Supreme Court decision held that fatal illness which prevented the insured from traveling northward excused his failure to be north of the southern boundary of Virginia by July 1st;[36] but this decision may be based on interpretation,[37] and at all events has been discredited by the New York Court of Appeals.[38]

The two exceptions referred to are:

(1) Warranties implied in law: In marine insurance the law implies a warranty "that the ship, in proceeding from one terminus to the other, shall pursue the usual course of voyage, without any delay or deviation; and any failure to comply with it exempts the underwriter from all liability from the moment of deviation."[39] Yet it is uniformly conceded that "necessity," or *"vis major,"* will excuse a deviation so produced,[40] and the British Marine Insurance Act of 1906 so provides.[41] To enumerate the various kinds of necessity or *"vis major"* which excuse a deviation would be beyond the scope of this discussion; among them may be mentioned stress of weather, necessity for repairs, need of provisions or of seamen to man the ship, danger of capture, even negligence of seamen, but not negligence of the master;[42] necessity of obtaining medical assistance for those on board in order to save human life, but not necessity of saving property other than that on board,[43] nor necessity of making the voyage a financial success,[44] nor seizure of the ship under legal process for claims against the insured.[45] The test is probably somewhat more liberal than strict impossibility, but it seems narrower than ordinary care under the circumstances.[46]

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tenant (bringing a steam engine close to a barn) was not beyond the insured's control. Where the tenancy is at will, the landlord's control seems clearer. *Hobby* v. *Dana* (N. Y. 1853) 17 Barb. 111. In several cases where the insured could not have prevented the event named in the condition without exercising uncanny diligence, the insurer has been held liable. See *infra,* footnote 60.

[36] *Baldwin* v. *New York Life Ins. & Trust Co.* (N. Y. 1858) 3 Bosw. 530; Hoffman, *J.,* supported the decision upon the ground that illness was an "act of God" which excused compliance with a condition requiring personal performance.

[37] *Ibid.,* Bosworth, *J.,* construed the policy to cover a death resulting from illness contracted in the South prior to July 1st.

[38] *Evans* v. *United States Life Ins. Co.* (1876) 62 N. Y. 304, which can be distinguished on the facts, but is said to have overruled the *Baldwin* case, in *Wheeler* v. *Connecticut Mut. Life Ins. Co., supra,* footnote 19, p. 552.

[39] Arnould, *Marine Insurance* (9th ed. 1914) § 30.

[40] Kent, *Ch.,* in *Robinson* v. *Marine Ins. Co.* (N. Y. 1806) 2 Johns. 89; and see the numerous cases in 2 Cooley, *Briefs on Insurance* (1905) pp. 1584 *et seq.*

[41] St. 6 Edw. VII, c. 41, § 49.

[42] See Cooley, *op. cit., loc. cit.; Burgess* v. *Equitable Marine Ins. Co.* (1878) 126 Mass. 70. [43] 2 Cooley, *op. cit.,* pp. 1590-91.

[44] *Burgess* v. *Equitable Marine Ins. Co., supra,* footnote 42 (deviation of fishing vessel due to non-negligent failure to have sufficient bait).

[45] *Augusta Ins. & Banking Co.* v. *Abbott* (1858) 12 Md. 348, 380 (deviation in time, or delay; there is more liberality in excusing delay). The court quotes from *La Guidon de la Mer* (2 *Pardessus, Collection de Lois Maritimes* (1831) 377) in support of the rule laid down, which indicates that the exception in question is of long standing.

[46] The British Marine Insurance Act of 1906, *supra,* footnote 41, phrases it: "where caused by circumstances beyond the control of the master or his employer."

That impossibility should excuse a breach of a condition implied in law is in harmony with legal principles. Where the law creates the condition of the insurer's obligation, he cannot complain that he is being held to a substantially different obligation from the one that he assumed, if the insured is excused from performing it under such circumstances as the law deems reasonable. The law giveth and the law taketh away.[47]

(2) The earlier editions of Arnould, *Marine Insurance,* seem to have been responsible for a notion that supervening illegality would excuse compliance with an express warranty in marine insurance. In the second edition of this work it was said: " . . . and it may be stated generally, that compliance with a warranty will be dispensed with, if it be rendered unlawful by a law enacted *since the time* of making the policy." [48]

The only case cited in support of this proposition is one in which it was stated that performance of a *promise* would be excused by supervening illegality.[49] On the authority of the same case, a similar statement was made by Parsons.[50] The statement has been criticized,[51] yet it is embodied substantially in the British Marine Insurance Act of 1906,[52] and has exercised some influence in the United States.[53] It is difficult to see how such a general rule can be supported.

In general, then, impossibility is not recognized as an excuse for a recognized breach of express warranty. However, no discussion of the effect of impossibility of compliance would be complete without some passing reference to the liberality of the courts in interpreting conditions in policies where to exact literal compliance would impose hardship on the insured. The front door is closed, but the back door is open. Not that this liberality is always illegitimate interpretation. There are recognized, albeit secondary, canons of construction to the effect that the court will strive to give a contract a meaning which makes its performance possible and reasonable rather than harsh or impossible,[54] that the main purpose of the instrument will be given effect,[55] and that the language will be construed most strongly against the party using it.[56] With these canons (of construction or destruction) the courts have demolished many an insurer's fortifications.

One cannot generalize further than to say that a policy-holder who has not been at fault has, in most jurisdictions, decidedly good chances of being allowed to recover on his policy in spite of the fact that a condition of the policy has not been literally complied with, where compliance has become impossible. To attempt to summarize all the con-

[47] Williston, *op. cit.,* § FFT. [48] (1850) Vol. 1. p. 588.
[49] *Brewster* v. *Kitchin* (1698) 1 Ld. Raym. 317, 321, 1 Salk. 198.
[50] 1 Parsons, *Marine Insurance,* (1868) 341.
[51] By the editors of the ninth edition of Arnould (§ 636), and by Arthur Cohen, *Notes on Insurance Law* (1895) 11 Law Quarterly Rev. 118.
[52] *Supra,* footnote 41, § 34 (1).
[53] *E. g.,* it is quoted with approval in *Mutual Benefit Life Ins. Co.* v. *Hillyard, supra,* footnote 7, p. 472.
[54] Williston, *op. cit.,* § 620. [55] *Ibid.,* § 619. [56] *Ibid.,* § 621.

flicting cases on the construction of express warranties would be beyond the limits of this discussion; but the following points may be noted:

(1) In applying the general clauses of standard fire policies relating to the physical risk (construction and use of the premises, exposures, etc.) the courts will take into account the habits and usages of mankind in reference to the particular kind of building or premises covered by the particular policy. Thus, the general clause against vacancy will be construed differently as applied to a schoolhouse or church or dwelling house, and as applied to a building occupied by a tenant than as applied to one occupied by the owner.[57] Thus, a clause that a policy on a factory should be void if the factory "shall cease to be operated," was held not breached by a temporary cessation caused by impossibility of getting operatives from any cause—in this case, an epidemic of yellow fever;[58] and a condition "if premises become vacant or unoccupied" was held not breached by vacancy of a water-power saw-mill caused by low water,[59] or by the sudden removal of a tenant without the knowledge of the insured, who lived at a distance.[60] In support of this view, it may be urged that the application of the general clauses of a standard policy to the particular facts is more like the application of a statute than the construction of an ordinary individual bargain; indeed, many states have fixed the forms of policies by statute. Hence, the language may be construed so as to carry out the principle of the condition without imposing undue hardship.

(2) Where the language is general and clearly extends to events within the insured's control, but may or may not extend to events beyond his control, the courts generally will not construe it to extend to events which it is impossible for the insured to control. Thus, an unqualified clause that any "increase of risk" will avoid the policy, has been held not breached by a falling of a portion of the building in which the insured goods were located,[61] or by the keeping of dangerous articles by a stranger on adjoining premises,[62] or by threats of incendiary fires;[63]

[57] *Ohio Farmers Ins. Co.* v. *Vogel* (1906) 166 Ind. 239, 76 N. E. 977; *Whitney* v. *Black River Ins. Co.* (1878) 72 N. Y. 117, 119.

[58] *Poss* v. *Western Ass. Co.* (Tenn. 1881) 7 Lea 704.

[59] *Whitney* v. *Black River Ins. Co., supra,* footnote 57; see also *Aurora Fire Ins. Co.* v. *Eddy* (1870) 55 Ill. 213 (water buckets not filled in freezing weather).

[60] *German Ins. Co.* v. *Davis* (1894) 40 Neb. 700, 59 N. W. 698; *Atlantic Ins. Co.* v. *Manning* (1877) 3 Colo. 224; *North American Fire Ins. Co.* v. *Zaenger* (1872) 63 Ill. 464. Many of the cases cited *supra,* footnote 33, may be distinguished on the ground that it was not impossible for the insured to have literally fulfilled the warranty.

[61] *Breuner* v. *Liverpool, etc., Ins. Co.* (1875) 51 Cal. 101; the court said (p. 107) that the clause "has reference only to a change produced by the act of the insured." In many standard policies, the phrase "within the knowledge or control of the insured" is added; such a clause settles the question of impossibility.

[62] *State Ins. Co.* v. *Taylor* (1890) 14 Colo. 499, 24 Pac. 333. It seems that this is a case of impossibility. It has been held that the insured cannot enjoin the use of adjoining premises merely on the ground that such use will increase the risk of fire to the insured's premises. *Chambers* v. *Cramer* (1901) 49 W. Va. 395, 401, 38 S. E. 691; *Rhodes* v. *Dunbar* (1868) 57 Pa. St. 274, 289.

such constructions give effect to the main purpose of insurance which is to provide indemnity for losses beyond the control of the insured. Moreover, the social value of insurance will be enhanced if it is made a workable institution for the average man who uses every means within his power to bring about a compliance with the terms of his policy.

(3) Where an agency beyond the insured's control produces an event which is literally a non-compliance with an express condition, and the same agency or event produces a loss for which the insurer would clearly be responsible but for such non-compliance, there is a real or apparent conflict between the main purpose of the contract and the express condition, and the insurer will generally be held liable. Thus, a marine policy which expressly covered loss by barratry, contained an express warranty that the ship should not be used in any unlawful trade; the insurer was held liable for a seizure of the vessel produced by the barratrous act of the master in secretly engaging in unlawful trade.[64] And so where a servant, unknown to the insured, brought on the premises a quantity of gasoline, contrary to the literal terms of a warranty [65] for the purpose of setting fire to the premises, the insurer was held liable [66] for the loss resulting from such fire. Again, a temporary absence of a night watchman, during which the fire occurred, was held not a breach of a condition requiring the insured "to keep a watchman on the premises at all times when not in operation," where the insured was without fault in employing a trustworthy watchman.[67] Where the agency in question is a stranger to the insured, the result is even clearer.[68]

III

CONDITIONS RELATING TO PROOF AND ENFORCEMENT.

Conditions relating to the proof and enforcement of the insured's claim may call for action by the insured either before or after the occurrence of the casulty insured against, or both. Thus, the common "iron-safe" clause in fire policies calls for the taking of an inventory and for

[63] *Williamsburg City Fire Ins. Co.* v. *Weeks Drug Co.* (1910) 103 Tex. 608, 132 S. W. 121.

[64] *Havelock* v. *Hancill* (1789) 2 Term. R. 277.

[65] The warranty provided that the policy should be void if gasoline were kept, used or allowed on the premises.

[66] *Queen Ins. Co.* v. *Van Giesen* (1911) 136 Ga. 741, 72 S. E. 41.

[67] *McGannon* v. *Michigan Millers' Mut. Fire Ins. Co.* (1901) 127 Mich. 636, 87 N. W. 61; *McGannon* v. *Millers' Nat. Ins. Co.* (1902) 171 Mo. 143, 71 S. W. 160. In each of these cases the court emphasized the fact that the negligence of the watchman was one of the risks insured against and that the insured had been without fault. See *McGannon* v. *Michigan Millers' Mut. Fire Ins. Co., supra,* p. 649; *McGannon* v. *Millers' Nat. Ins. Co., supra,* p. 152; but see *supra,* footnote 34.

[68] *Loud* v. *Citizens Mut. Ins. Co.* (Mass. 1854) 2 Gray 221. Here some sailors, given shelter by the insured, in his absence and contrary to his express directions built a fire in a defective stove, resulting in the burning of the building; the policy contained an unqualified clause against any "increase of risk," yet the insured was allowed to recover.

entering purchases and sales in account books and for the presentation of these books in an iron safe or other safe place, *before* the fire occurs; and for the production of these books *after* the fire. Generally, in so far as these conditions call for action by the insured before the loss occurs, they also relate to the moral risk, since the insured will obviously be under a greater temptation to cause the fire or other casualty by his own voluntary act if no record has been preserved of the extent of his loss. Hence, even under the same clause, a substantial difference exists between the things to be done before, and those to be done after, the casualty insured against; the former are more strictly construed. Thus the courts seem more liberal in excusing non-production of the books (under the "iron-safe" clause) than in allowing recovery where the books have not been kept at all. Again, a condition calling for notice of the sickness of a horse insured, for the purpose of enabling the insurer to send its veterinary surgeon to treat the case[69] is more strictly construed than one calling for notice of accident under an accident policy.[70]

At all events, a majority of courts recognize a distinction between conditions calling for action by the insured after the loss or casualty insured against has occurred, and those calling for action before loss; the former will be construed as calling for what is "reasonably possible."[71] This distinction has been declared to be unsound, on the ground that all conditions (except possibly some conditions calling for filing suit within a limited time) are conditions precedent to the insurer's liability and hence must be literally performed.[72] Such a purely analytical solu-

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[69] *Johnston* v. *Northwestern Live Stock Ins. Co.* (1900) 107 Wis. 337, 83 N. W. 641; see also *Swain* v. *Security Live Stock Ins. Co.* (1896) 165 Mass. 321, 43 N. E. 105. In these cases it was highly difficult but not impossible for the insured to comply with the condition calling for notice to the insurer within twenty-four hours of the animal's sickness.

[70] See *Comstock* v. *Fraternal Accident Ass'n.* (1903) 116 Wis. 382, 93 N. W. 22, and cases cited.

[71] Howard, *J.*, in *Peele* v. *Provident Fund Soc.* (1896) 147 Ind. 543, 549, 44 N. E. 661 (accident policy provided it should be void if written notice of death not given in ten days after death; widow, prostrated by death of husband, gave notice in ten days after she learned coroner's verdict that death was accidental). The same judge says: [The defendant's answer] "admits what has been called the capital fact in insurance cases, that is, the death of the assured by accidental drowning while holding his policy of insurance, all the conditions of which had been duly observed and kept by him . . . A distinction has been made between conditions preceding the loss or accident . . . The former are more usually of the essence of the contract, and are, therefore, generally interpreted more strictly. When, however, the liability has once accrued, then such conditions as relate to the giving of notice, making proof of loss, etc., that is, conditions subsequent to the capital fact of liability, have, in general, been interpreted as requiring what is reasonably possible on the part of the beneficiary." *Ibid.*, pp. 548-49. See also *Paltrovich* v. *Phoenix Ins. Co.* (1894) 143 N. Y. 73, 76, 37 N. E. 639, where the court said: " . . .the stipulations of a policy which relate to the procedure merely, after the occurrence of a loss, are to be reasonably and not rigidly construed . . . "

[72] (1903) 16 Harvard Law Rev. 452; (1910) 10 Columbia Law Rev. 575. The leading case in support of this view is *Worsley* v. *Wood* (1796) 6 Term. R. 710, decided at a time when the principles of fire insurance were not well understood. Here the failure to produce the certificate of the minister and church wardens that

tion of the problem fails to take account of important practical differences. Premium rates vary with the kind of risk, not with the kind of proof furnished. Moreover conditions operating after loss are apt to cause hardships out of all proportion to the advantages which the insurer gains by strict and literal compliance, because the unfortunate event itself will usually make strict compliance difficult or impossible. Again, the insuring public will inevitably look with disfavor upon defenses based upon failure to comply strictly with the conditions as to proof of loss; and to that extent the social value of insurance will be impaired. Legal analysis never tells us what rule is best; it merely clears the ground of intellectual rubbish.[73] Whether these conditions are precedent or subsequent (and the legal analysts do not entirely agree upon the meaning of these terms) is of secondary importance. They might be called conditions subsequent-to-the-loss, or "post-casual conditions," in a Wigmorean vein.

It is not clear that nothing short of impossibility will excuse a literal compliance with these conditions. The United States Supreme Court has said that the "iron-safe" clause calls only for ordinary care on the part of the insured to preserve and produce the books after the fire.[74] However, clearly the insured must not have been at fault. Thus, where he carelessly leaves his books out of the safe and they are burned,[75] or where his failure to give prompt notice of an accident is due to his ignorance of the existence of the policy,[76] he cannot recover. And a similar result was reached where the insured failed to submit to examination by the insurer's officials because he was then a fugitive from justice under a charge of murder.[77]

Cases of objective impossibility, as where the fact to be reported cannot be known within the time limited,[78] or where the books to be

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the loss was bona fide, as required by the terms of a fire policy, was held not excused by the unreasonable refusal of those persons. The American cases on this point appear to be divided. See 4 Cooley, *op. cit.*, p. 3401. Professor Williston's distinction between such a certificate and an architect's certificate under a building contract seems uninstructive, Williston, *op. cit.*, § 795; even more so is the attempted distinction between notice of accident and proofs of loss, under an accident policy, made in *Hatch* v. *United States Casualty Co.* (1908) 197 Mass. 101, 83 N. E. 398.

[73] Corbin, *Jural Relations and Their Classification* (1921) 30 Yale Law Journ. 226, 237.

[74] *Liverpool, etc., Ins. Co.* v. *Kearney* (1901) 180 U. S. 132, 21 Sup. Ct. 326 (inventory lost while being removed from burning building). See *McNally* v. *Phoenix Ins. Co.* (1893) 137 N. Y. 389, 401, 33 N. E. 475 (diligence enough).

[75] See *Yates* v. *Thomason* (1907) 83 Ark. 126, 102 S. W. 1112.

[76] *Johnson* v. *Maryland Casualty Co.* (1905) 73 N. H. 259, 60 Atl. 1009; see also *Swain* v. *Security Live Stock Ins. Co., supra,* footnote 69.

[77] *Pearlstine* v. *Westchester Fire Ins. Co.* (1904) 70 S. C. 75, 49 S. E. 4.

[78] *Trippe* v. *Provident Fund Soc.* (1893) 140 N. Y. 23, 35 N. E. 316 (death of insured in falling building not discovered until three days after it occurred; notice within ten days after discovery, though more than ten days after death, held sufficient compliance with clause requiring notice "within ten days from the date of either injury or death").

produced are lost or destroyed,[79] are clear. And since it seems that conditions as to the notice, or proof of loss call for personal performance by the insured,[80] any personal disability of the insured which, without his fault, makes strict compliance by him impossible, will excuse non-compliance to the extent that it was so caused—as unconsciousness of the insured due to the accident insured against,[81] or insanity,[82] or even the insured's or beneficiary's ignorance of the facts to be reported.[83]

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[79] *Liverpool etc., Ins. Co.* v. *Kearney, supra,* footnote 74; *Leiman* v. *Metropolitan Surety Co.* (N. Y. App. T. 1908) 111 N. Y. Supp. 536 (burglary insurance; books destroyed by fire after the burglary); for similar cases, see (1901) 52 L. R. A. 424, 426, note.

[80] Marshall, *J.*, in *Comstock* v. *Fraternal Accident Ass'n., supra,* footnote 70, p. 388; but he adds: " . . . though probably a notice by someone in his behalf, if necessary; would have been sufficient."

[81] *Comstock* v. *Fraternal Accident Ass'n., supra,* footnote 70, and a number of cases cited in the notes in (1909) 18 L. R. A. (N. S.) 109 and (1910) 27 L. R. A. (N. S.) 319; *Hilmer* v. *Western Travelers Accident Ass'n.* (1910) 86 Neb. 285, 125 N. W. 535.

[82] *Insurance Companies* v. *Boykin* (U. S. 1870) 12 Wall. 433 (affidavit as to loss under fire policy excused by insanity of insured; seems clear personal performance was called for); *Houseman* v. *Home Ins. Co.* (1916) 78 W. Va. 203, 88 S. E. 1048; note L. R. A. 1917 A, 305.

[83] *Trippe* v. *Provident Fund Soc., supra,* footnote 78; *Peele* v. *Provident Fund Soc., supra,* footnote 71; notes in 18 L. R. A. (N. S.) 109, 27 L. R. A. (N. S.) 319 (accident or health policies) and 41 L. R. A. (N. S.) 285 (life policies). Cases where the policy required "immediate notice" do not clearly fall under this head, since "immediate" is a relative term.